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## A BRIEF SURVEY OF EQUITY JURISDICTION.<sup>1</sup>

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### V.

#### BILLS OF EQUITABLE ASSUMPSIT.

REFERENCE was made, in the preceding article,<sup>2</sup> to the wide, indeterminate, and vague sense in which the term "account" is used in equity; and it was observed that it has been usual to call all bills in equity, which may involve a reference to a Master, to take an account of any kind or for any purpose, bills for an account. Accordingly, it has been usual to call the bills now to be considered, bills for an account. Indeed, this is the only name by which they have ever been known; and no clear distinction has ever been taken between these bills and the class of bills treated of in the preceding article. Moreover, the writer is not aware that it has ever been doubted that the former constitute true bills for an account. To call them, therefore, Bills of Equitable Assumpsit, is undoubtedly a novelty; but it is a novelty which is believed to be justified by the circumstances of the case. That the bills treated of in the preceding article are true bills for an account, is a fact which is not supposed to be open to doubt; and it is hoped that the present article will convince the reader of the necessity of finding another name for the bills now to be con-

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<sup>1</sup> Continued from Vol. II., p. 267.

<sup>2</sup> See Vol. II., p. 243.

sidered. "Equitable Assumpsit" may not be the best name that can be found, but it is believed to be open to no serious objection, and it is strictly analogous to the name given to another class of bills, namely, "Equitable Ejectment." It may be proper, however, to remind the reader that the term "equitable," in this connection, means, not that the claim on which the bill is founded is equitable, but that the suit instituted by the bill differs from an action of assumpsit only or chiefly as a suit in equity necessarily differs from an action at law.

As bills for an account have been pretty fully described in the preceding article, it will be convenient, in the present article, to point out in what particulars bills of equitable assumpsit differ from bills for an account. First, then, while, as has been seen, a bill for an account is founded upon an obligation to render an account, a bill of equitable assumpsit is founded upon a debt; and, while it is the object of a bill for an account to compel performance of an obligation to account, it is the object of a bill of equitable assumpsit to compel payment of a debt.

Secondly, though the final relief upon both classes of bills is the same, namely, the payment of a debt, yet, while upon a bill for an account, such final relief is strictly consequential upon the taking of an account, which constitutes the primary relief, upon a bill of equitable assumpsit the payment of a debt constitutes the entire relief sought. In other words, the debt finally recovered upon a bill for an account has no legal existence until the account is taken and a balance struck, and therefore the accounting is always the cause of the debt, while the debt recovered upon a bill of equitable assumpsit exists when the bill is filed, and the bill is founded upon it, and the cause of the debt varies with the transaction out of which the debt arose. A consequence of this distinction is that, in a bill for an account, it is necessary only to state facts which constitute an obligation to account, and that an accounting will show a balance in the plaintiff's favor, while, in a bill of equitable assumpsit, it is necessary not only to state facts which constitute a debt, but also to show the amount of the debt. This latter rule is not, indeed, so strictly applied as to require a plaintiff to state the precise amount due to him, at the peril of having his bill dismissed, but it effectively prevents a plaintiff from recovering *more* than he claims. If the amount originally due to the plaintiff has been reduced by payments, he may either claim

the full amount originally due to him (in which case, of course, the defendant must set up the payments as a defence *pro tanto*), or he may, at his option, claim only what remains due to him after deducting the payments. Before taking this latter course, however, the plaintiff must make sure that what he allows as a payment, is in truth a payment, and not a cross claim or set-off; for, if he allows as a payment what is in truth a cross claim or set-off, the consequence will be that he will reduce the amount of his own claim, and yet leave the defendant's cross claim in full force. Whenever, therefore, there exist cross demands between two persons, and one of them files a bill of equitable assumpsit against the other, the only safe course for the plaintiff is to claim the full amount of all the items in his favor, paying no attention to the items in the defendant's favor, but leaving the defendant either to avail himself of the items in his own favor in the same suit, or to make them the subject of a separate suit, at his option.

Thirdly, while the jurisdiction of equity over bills for an account is founded on the nature of the obligation sought to be enforced, coupled with the fact that there is no remedy at law for the enforcement of such an obligation, the jurisdiction of equity over bills of equitable assumpsit is founded on the fact that the claim sought to be enforced is too complicated in its circumstances to be tried by a jury. While, therefore, a bill for an account involves primarily but one question, namely, is the defendant under an obligation to account to the plaintiff, a bill of equitable assumpsit involves two questions, namely, first, is the defendant indebted to the plaintiff? secondly, is the case too complicated to be tried by a jury? A consequence is that, while the plaintiff in a bill for an account has the affirmative of but one question to establish in order to entitle him to a decree, and hence it is impossible for him to fail except upon the merits of his case, a plaintiff in a bill of equitable assumpsit has the affirmative of two questions to establish, — one involving the merits of his case, the other involving only a question of jurisdiction; and if he fail to establish either, his bill will be dismissed. In short, while a bill for an account never properly involves any question of jurisdiction, a bill of equitable assumpsit always involves a question of jurisdiction. Moreover, as a plaintiff must always state in his bill whatever he will be required to prove at the hearing in order to obtain a decree, it follows that a plaintiff in equitable assumpsit must state facts showing not only

the existence of the cause of action on which the bill is founded, but also that it is a cause of action of which equity will take jurisdiction; and for this latter purpose it will not be sufficient to allege generally that the cause of action involves so much complication that it cannot be properly tried by a jury; but facts must be stated from which the court can see that such complication exists.

Fourthly, in equitable assumpsit, whatever money the defendant has paid, either to the plaintiff or on the plaintiff's account and by his authority, will constitute either a defence *pro tanto*, to be set up as such in the defendant's defensive pleading, or a cross claim in the defendant's favor, of which the defendant may avail himself in the same action or in a separate action, at his option. Upon a bill for an account, on the other hand, whatever money the defendant has paid, either to the plaintiff or on the plaintiff's account, has been paid in legal contemplation out of the plaintiff's own money in the defendant's hands, and, therefore, it constitutes neither a defence to the plaintiff's claim (which is only for such *balance* as shall be found in the plaintiff's favor upon the accounting), nor a cross claim in the defendant's favor. Such payments, therefore, should not properly be noticed in the defendant's pleadings, but will be allowed to him on the accounting as items of discharge.

Fifthly, a bill of equitable assumpsit, as well as a bill for an account, may be successfully met by the defence of an account stated; but the defences known by this name in the two classes of cases differ widely from each other. As the object of a bill for an account is to compel performance of an obligation to account, of course it is a good defence to such a bill that the obligation has been performed. Moreover, as the obligation is only to account, — not to account and pay, — it follows that an account stated is a complete legal defence to a bill for an account, as it was formerly (under the name of *plene computavit*) to an action of account. Such a defence, though it does not show that the plaintiff's claim has been actually satisfied, does show that its legal nature has been changed, — that it has been converted from a demand lying in account into a debt. In equitable assumpsit, on the other hand, the defence of an account stated does not show that the defendant's obligation has been performed, nor that the legal nature of the plaintiff's claim has been changed. The plaintiff's claim was originally a debt, and it is the same debt still; and an account stated simply shows that the amount of the debt has been ascer-

tained and settled. Clearly, therefore, it is no legal defence to the plaintiff's claim. And yet it is a good equitable defence to the bill. Why? Because it is a complete answer to a necessary allegation in the bill, namely, that the plaintiff's claim is too complicated to be tried by a jury. It is a good defence, therefore, going to the jurisdiction of the court.

Sixthly, though the first decree upon a bill of equitable assumpsit, like that upon a bill for an account, directs a reference to a Master to take an account, yet the account to be taken in the one case differs widely from that in the other. Upon a bill for an account, the object of the decree in directing an account is to compel performance by the defendant of his obligation; while, upon a bill of equitable assumpsit, the object is to ascertain the amount of the defendant's indebtedness to the plaintiff. In the first case, therefore, as the defendant is to be compelled to do what he ought to have done voluntarily and without a suit, all the burden of the accounting should be cast upon him. Accordingly, he is required to make up his account in proper form and bring it into the Master's office, making oath to it before the Master; and if the plaintiff can show that the account so brought in is defective, either in form or in substance, the defendant must supply its defects, unless he can show that it is impossible for him to do so. Nothing short of impossibility will exempt him from a full performance of his obligation. If he attempt to justify an imperfect account by saying that he cannot make it more perfect without consuming an excessive amount of time, and incurring great and unreasonable labor and expense, the conclusive answer will be that he has bound himself to account fully. In the second case, on the other hand, all the burden of the (so called) accounting rests upon the plaintiff. The only obligation which the defendant is under to the plaintiff is that of paying him the debt he owes him; and to the performance of that obligation the ascertaining of the amount of the debt is a condition precedent to be performed by the plaintiff. In short, the ascertaining of the amount is a part of the plaintiff's case, and the plaintiff, like other plaintiffs, must make out his case. To aid him in doing this he is, like other plaintiffs, entitled to discovery from the defendant, *i.e.*, he can compel the defendant to state under oath what he knows as to the amount of the debt, and also to produce under oath any books or documents in his possession which will aid the plaintiff in proving the amount of the debt;

but this is the limit of the plaintiff's rights. If, indeed, the amount of the debt originally due to the plaintiff has been reduced by payments, such payments constitute, as we have seen, a defence *pro tanto*, and so the defendant, of course, has the burden as to them. So if, as often happens in equitable assumpsit, the defendant sets up a cross demand, *i.e.*, while admitting that he owes the plaintiff, claims that the plaintiff also owes him, and demands that the debt due from the plaintiff to him shall be applied in payment and extinguishment of the debt due from him to the plaintiff, of course, the defendant will be plaintiff as to the debt claimed to be due to him, and so he will have the burden as to that. In a word, the so-called accounting before a Master in equitable assumpsit is a substitute for a trial by jury, and hence it is to be governed by the same principles as the latter, *mutatis mutandis*.

Seventhly, though the final decree upon a bill for an account, like that in equitable assumpsit, is for the payment of money, yet, while in the latter the recovery of money is the primary and direct object of the suit, in the former it is only consequential relief. When, upon a bill for an account, the defendant is adjudged to have fully accounted, the whole object for which equity assumed jurisdiction of the suit is accomplished. The plaintiff's claim has, by the accounting, been converted into a debt recoverable at law; and the only principle on which equity proceeds to decree payment of this debt is the avoiding of a multiplicity of suits. It follows, therefore, that a bill for an account, unlike a bill of equitable assumpsit, is always liable to involve two successive suits in one; namely, first, a suit for an account, and, secondly, a suit in the nature of an action of debt to recover the balance found in the plaintiff's favor. It is true that a bill of equitable assumpsit, like a bill for an account, always requires two decrees, as well as a reference to a Master, but that is merely because it is not the practice for the judge who hears a cause to occupy his time in ascertaining the amount due to the plaintiff. He contents himself with ascertaining that the plaintiff has a cause of action, *i.e.*, that he is entitled to recover something, and delegates to one of his assistants the duty of ascertaining the amount of the plaintiff's claim. The reference to the Master, therefore, is merely for the purpose of completing the trial, which is left unfinished at the hearing. If the trial were completed at the hearing, there

would be no reference and only one decree. Upon a bill for an account, on the other hand, the trial is finished at the hearing, and the decree then made is in its nature a final decree, and the reference ordered is for the purpose of obtaining an execution of that decree. The fact, therefore, of there being two decrees upon a bill for an account is due entirely to the double nature of the suit just referred to. Were it not for this latter circumstance, there would be but one decree, and the suit would end with the taking of the account. As it is, the two decrees which are made are both final in their nature (each of them disposing of the whole subject of one suit), while the first decree upon a bill of equitable assumpsit is, in its nature as well as in name, interlocutory.

Lastly, an injunction to restrain the defendant from suing at law is a very common incident of a bill of equitable assumpsit, while it is never an incident of a bill for an account. The reason of this distinction is in one view plain enough. No action at law will lie on an obligation to account, and hence equity can have no occasion to enjoin such an action. On the other hand, whenever a bill of equitable assumpsit will lie, an action of debt or assumpsit will also lie; and, therefore, equity will have occasion to grant an injunction as often as a plaintiff sues at law when he ought instead to have filed a bill of equitable assumpsit. But how can it be said that a plaintiff, who confessedly has a legal right upon which an action will lie, *ought* to enforce that right in equity, and not at law? The reason why equity enjoins the prosecution of an action at law generally is, not that the plaintiff ought to have sued in equity (for generally in such cases he could not have sued in equity if he would), but that he ought not in justice to recover at all, or, at least, ought not to recover so much as he would recover at law. In other words, the reason is that the defendant has an answer to the action, or to some part of it, which in justice and equity ought to prevail, but which for some technical reason is unavailable at law. In the case now supposed, however, there is no element of injustice in the plaintiff's claim; and even if there were, it would not follow that the plaintiff ought to have refrained from suing at law, and to have sued in equity instead. A plaintiff never even has a right (much less is it his duty) to sue in equity on a legal claim, merely because, if he sue at law, he will get what he ought not to get. When a plaintiff sues in equity upon a legal claim, he does so, as a rule, in the

exercise of a privilege, not in the performance of a duty; he is permitted, not required, to sue in equity, and therefore he selects his tribunal with a view to his own interests,—not with a view to the defendant's interests,—and the latter has no voice in the question. Accordingly, even when actions of account were in use, though a plaintiff was permitted to file a bill for an account, on the ground that an action of account was an inadequate remedy; yet, if he chose to bring an action of account, the defendant could not obtain an injunction, though he might prefer to account in equity. How is it, then, that the case now under consideration forms an exception to the general rule? The answer to this question illustrates the very peculiar ground upon which equity assumes jurisdiction in this class of cases, namely, the unfitness of a common-law court for the trial of them. In the question, *How shall a case be tried?* the defendant is of course as much interested as the plaintiff, and therefore he is entitled to be heard before being forced to go to trial in a common-law court in a case for which he deems the common-law mode of trial unfit. Where then can he be heard? Not in the common-law court where the action is brought, for such a court cannot decline jurisdiction of a case regularly brought before it, and its only way of disposing of the case is by trying and deciding it, and its trial and decision will be final and conclusive. Moreover, such a court has but one mode of trial, namely, by a jury. With the consent of both parties, indeed, it can and will refer a case to an arbitrator, if it be deemed unfit to be tried by a jury; but without such consent the court is powerless.

A court of equity, then, is the only place in which the defendant can be heard upon the question whether the case is fit to be tried by a jury; and accordingly he may file a bill for the purpose of obtaining such a hearing. What will be the equity of such a bill, and what relief will it seek? If the defendant have no cross demands, it seems that the equity of the bill will be only this, namely, that the defendant is prosecuting an action against the plaintiff which is unfit to be tried by a jury, and the only relief prayed will be a perpetual injunction against the prosecution of the action. At the hearing, therefore, the only question to be tried and decided will be whether the action is fit to be tried by a jury. If that question be decided in the affirmative, the bill will be dismissed; if it be decided in the negative, a decree will be made for

a perpetual injunction. In the former event, of course the action at law will proceed; in the latter, the plaintiff at law, if he wish to enforce his claim, will have to file a bill of equitable assumpsit, as he ought to have done in the first instance.

If the defendant at law have cross demands against the plaintiff at law, his bill may, at his option, have a double equity; namely, first, that he has demands against the defendant in equity which are unfit to be tried by a jury; secondly, that the defendant in equity is prosecuting an action at law against him which is unfit to be tried by a jury; and accordingly double relief may be prayed, namely, first, that the defendant in equity be compelled to satisfy the demands of the plaintiff in equity; secondly, that the prosecution of the action at law be enjoined. In short, the bill may have the double character of a bill of equitable assumpsit and a bill to enjoin an action at law. If the bill assume this double character, the subsequent stages of the suit will vary according to circumstances. Thus, if the defendant resist the suit in both its aspects, there will be two questions to be tried at the hearing; namely, first, whether the claim set up in the bill is fit to be tried by a jury; secondly, whether the action at law is fit to be tried by a jury. If the first question be decided in the affirmative, so much of the bill as seeks a recovery against the defendant will go for nothing. If the second question be decided in the affirmative, so much of the bill as seeks an injunction will go for nothing. If both questions be decided in the affirmative, the bill will be dismissed. If the second question be decided in the negative, a perpetual injunction will be granted, and the plaintiff at law will have to file a bill of equitable assumpsit, if he wish to enforce his claim. If the first question be decided in the negative, it will follow that the plaintiff in equity is entitled to enforce his claim in equity; and accordingly a decree will be made, referring the cause to a Master to take an account of the plaintiff's claim, *i.e.*, to ascertain its amount. When the amount has been ascertained, the cause will be brought on again, and a final decree will be made that the defendant pay the plaintiff the amount found due to the latter. If both questions be decided in the negative, of course the plaintiff will be entitled to both branches of relief just indicated.

The defendant in equity may, however, think it not for his interest to resist the suit in equity; and in that case he will submit to an injunction, and will set up his cross claims, either in his

answer to the plaintiff's bill or in a cross-bill; and the suit in equity will then assume the character of a suit and cross-suit, and the cross claims (when severally ascertained) will be set off against each other, and a decree will be made in favor of the party in whose favor the balance is found to be for the payment of such balance. Indeed, the defendant in equity will generally find it to be for his interest to set up his cross claims in the suit brought against him, even though he resist that suit, in order that, in the event of his resistance proving unsuccessful, he may try his claims in the same suit in which the claims of the plaintiff in equity are tried, and thus have the former set off against the latter.

As to what will constitute sufficient complication to render a case unfit to be tried by a jury, no certain rule can be laid down, and hence much must necessarily be left to the discretion of the judge before whom the question comes.<sup>1</sup> There are one or two considerations, however, which will be found to be of much service in guiding a judge's discretion, and in leading him to a correct decision of the question. First, the burden should be cast upon him who denies the competency of a jury to try the case; for trial by jury is the constitutional mode of trying legal rights. Secondly, it should not be deemed sufficient for the party who has the burden to show that the mode of trial provided by equity will be better in the given case than trial by jury. He should be required to show that a jury cannot try the case properly, and, therefore, that there is a necessity for providing some other mode of trial; for nothing short of necessity can justify an equity judge in depriving either party to a legal controversy of his constitutional right to a trial by jury. Thirdly, the temptation should be guarded against of letting the decision turn upon the number of items involved; for much more depends upon the character of the items than upon their number. In many cases, where the items are

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<sup>1</sup> For cases in which a bill of equitable assumpsit has been entertained, see *Kennington v. Houghton*, 2 Y. & Coll. C. C. 620; *Taff Vale Railway Co. v. Nixon*, 1 H. L. Cas. 111. For cases in which there has been held not to be sufficient complication to warrant a bill of equitable assumpsit, see *Dinwiddie v. Bailey*, 6 Ves. 136; *King v. Rossett*, 2 Y. & Jer. 33; *Phillips v. Phillips*, 9 Hare, 471; *Padwick v. Stanley*, 9 Hare, 627; *Smith v. Leveaux*, 2 DeG., J. & S. 1; *Moxon v. Bright*, L. R. 4 Ch. 292. In *Foley v. Hill*, 2 H. L. Cas. 28, which was a bill by a customer against his banker, there were only three items involved, namely, a deposit of £6,117 10s., and two checks for £1,700 and £2,000, respectively; and it was held that the bill would not lie. The case involved another question of jurisdiction; otherwise, it would have been too clear for argument.

numerous, they are yet so simple in their character, and so much alike, that their number does not render the case at all complicated. Of this description are most cases between bankers and their customers, where the items, however numerous, constitute but two simple classes; namely, money deposited with (*i.e.*, paid to) the banker by the customer, and money paid by the banker to the customer, or to others by his order, *i.e.*, in payment of the customer's checks. Moreover, it is scarcely possible, in such a case, that the controversy should not turn entirely upon a small number of items, the others being involved in no doubt. The truth of this last observation is strikingly illustrated by the case of *Bayley v. Adams*,<sup>1</sup> where a bill of equitable assumpsit was filed upon a claim which involved but one controverted fact, and that too a fact eminently proper to be tried by a jury. Fourthly, the degree of complication which a suit involves may depend upon the nature of the defence, as well as upon the nature of the claim. Thus, when the defence is payment, the payment may be made up of a great number of items, and items of payment are as likely to involve complication as items of claim.

It has been held<sup>2</sup> that a case may be so circumstanced as to give the plaintiff an absolute choice between a bill of equitable assumpsit and an action at law, *i.e.*, that a bill of equitable assumpsit, if he choose to file one, will be entertained, and yet, if he choose to bring an action at law, such action will not be enjoined; in other words, that a case may be so complicated as to authorize the plaintiff to come into equity, and yet not so complicated as to require him to do so. Doubtless, if either party ever has a right to choose between an action at law and equitable assumpsit, that right must belong to the plaintiff; but, if what has been said in the preceding paragraph is correct, neither party ever has that right; for, if the case can be tried by a jury, each party is entitled to have it so tried, and if it cannot, neither party has a right to make the attempt so to try it. It seems, therefore, that equity, in assuming or declining jurisdiction in this class of cases, should always be governed by the same principles, whether its jurisdiction be invoked by the plaintiff or by the defendant.

When there are cross demands between two persons, and one

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<sup>1</sup> 6 Ves. 586.

<sup>2</sup> *S. E. Railway Co. v. Brogden*, 3 M. & G. 8; and see *N. E. Railway Co. v. Martin*, 2 Ph. 758.

of them files a bill of equitable assumpsit against the other, and the latter sets up the claims in his own favor, either in his answer or in a cross-bill (in which latter case the suit and cross-suit are heard together and as one suit), of course the trial will presumably involve twice as much complication as if the items in the plaintiff's favor were alone to be tried; and that fact has led to the opinion that the question, whether equity shall assume jurisdiction in a given case, depends largely upon whether there are cross demands.<sup>1</sup> That opinion, however, seems to be erroneous. First, the question is, not what complication a suit in equity *may* involve, but what complication a trial at law *will* involve. Secondly, cross demands can be tried at law in one action only when the defendant sets up the demands in his favor by a plea of set-off, or (in the modern statutory systems) by a counter-claim; and whether a defendant in an action shall avail himself of items in his favor by way of set-off or counter-claim, or by a separate action, is entirely at his option. Suppose, then, one of two persons between whom cross demands exist, brings an action at law on the items in his favor, and thereupon the other files a bill of equitable assumpsit and for an injunction. First, the defendant in equity may demur to the bill as a bill of equitable assumpsit, and if he do, his demurrer must be allowed, unless the plaintiff in equity can show that the demands in his favor are too complicated to be tried by a jury; and in deciding this question, clearly no notice can be taken of the demands in favor of the defendant in equity. Secondly, the defendant in equity may demur to the bill as a bill for an injunction, and if he do, his demurrer must be allowed, unless the plaintiff in equity can show that the demands on which the action at law is founded are too complicated to be tried by a jury; and here again no notice can be taken of the demands in favor of the plaintiff in equity, for he has not set them up in the action at law; and even if he had done so, he could not make that fact a ground for asking for an injunction. If both demurrers be allowed, on the ground that the demands of neither party are too complicated to be tried by a jury, and thereupon the plaintiff in equity plead the demands in his favor by way of set-off or counter-claim to the action at law brought against him, it may happen that the demands of both parties will make the case too complicated to be tried by a jury, though the demands of neither party alone would

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<sup>1</sup> But see *infra*, p. 250, n. 1.

have that effect. If such an improbable event should happen, the plaintiff at law would clearly be entitled to abandon his action at law, and file a bill of equitable assumpsit, setting forth his claim, that he had brought an action to enforce it, and that the defendant to the action had set up therein demands in his own favor by way of set-off or counter-claim, and had thus rendered the action too complicated to be tried by a jury. It is true that the existence of cross demands would thus become indirectly the cause of equity's assuming jurisdiction, but the direct cause would be the fact of the defendant's insisting upon having the demands in his favor tried in the same action in which the plaintiff's were tried.

It is possible also that the plaintiff might take another course in the case just supposed; namely, file a bill to restrain the defendant from giving any evidence, on the trial of the action, in support of the demands in his favor, and thus making it impracticable to try the action. Whether such a bill would lie or not, would seem to depend upon whether the right of the plaintiff to have his case tried by a jury, or the right of the defendant to have his demands set off against the plaintiff's demands, should be deemed the more sacred.

Much of the uncertainty and confusion to be found in the books on the subject of cross demands are due to the inveterate habit, prevailing among lawyers as well as among laymen, of applying unconsciously to cross demands the civil-law doctrine of compensation (*compensatio*); namely, that cross demands extinguish each other *ipso jure*, and hence that only the balance (in favor of the party whose demands are the larger) is due.<sup>1</sup> If the doc-

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<sup>1</sup> A mistake could scarcely become so prevalent without some special reason; and more than one such reason can easily be found. First, the doctrine of compensation is founded in natural justice. "Natural equity says that cross demands should compensate each other by deducting the less sum from the greater; and that the difference is the only sum that can be justly due. But positive law, for the sake of the forms of proceeding and convenience of trial, has said that each must sue and recover separately in separate actions. . . . The natural sense of mankind was first shocked at this in the case of bankrupts, and it was provided for by 4 Anne, c. 17, § 11, and 5 Geo. II., c. 30, § 28. . . . Where there was no bankruptcy, the injustice of not setting off (especially after the death of either party) was so glaring that Parliament interfered by 2 Geo. II., c. 22, § 13, and 8 Geo. II., c. 24, § 5 [Statutes of Set-off]." Per Lord Mansfield, in *Green v. Farmer*, 4 Burr. 2214, 2220-1. Secondly, the system of merchants' accounts, which had its origin in countries where the civil law prevailed, and which is in use all over the world, has made every mercantile man familiar in practice with the doctrine of compensation. According to that system, there is no difference between the payment of a debt and a loan of money. In the case of either, the person receiving the money is made debtor for it,

trine of compensation were a part of our law, it would, of course, follow that cross demands could never be separated from each other, and that they would always have to be the subject of a single trial, and hence that demands in favor of a defendant would always have the same effect in rendering a trial complicated as demands in the plaintiff's favor.<sup>1</sup> In short, by the doctrine of compensation every demand in a defendant's favor operates as a payment of the demands in the plaintiff's favor until the latter are extinguished, and hence every such demand is subject to the observations made in a previous paragraph on the defence of payment.<sup>2</sup>

Though cross demands do not with us extinguish each other *ipso jure*, yet they may be made to do so by the parties to them, and that too by a mere agreement, and without any physical act being done. Thus, if A owe B \$1,000, and B owe A \$500, and they agree that the two demands shall be set off against each other, the debt due to A and one-half of the debt due to B will thereupon be extinguished, and a debt of \$500, due from A to B, will alone remain.<sup>3</sup> That this result would be produced by the

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while the person from whom it is received is made creditor. Thus, if A lend \$100 to B, A is made creditor for \$100 in the books of B, and B is made debtor for \$100 in the books of A. Then, when B pays the debt, B is made creditor for \$100 in the books of A, and A is made debtor for \$100 in the books of B. Thus, A and B are each both debtor and creditor on the books of the other for \$100; and then, by the operation of the doctrine of compensation, the debt due by each to the other is extinguished by the debt due to him from the other; and, according to merchants' accounts, it is in this way alone that a debt can ever be paid.

<sup>1</sup> And this accounts in part, at least, for the opinion which has been combated in the last paragraph but one. Indeed, Lord Justice Turner, who went the length of holding that bills of equitable assumpsit are confined to cases of cross demands, based his opinion entirely upon the doctrine of compensation. Thus, in *Phillips v. Phillips*, 9 Hare, 471, he said: "A bill of this nature will only lie where it relates to that which is the subject of a mutual account; and I understand a mutual account to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account. I take the reason of that distinction to be, that, in the case of proceedings at law, where each of two parties has received and paid on account of the other, what would be to be recovered would be the balance of the two accounts, and the party plaintiff would be required to prove, not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments." And see, to the same effect, *Padwick v. Stanley*, 9 Hare, 627; and compare *Makepiece v. Rogers*, 4 DeG., J. & S. 649.

<sup>2</sup> See *supra*, p. 247.

<sup>3</sup> "If obligor or feoffor be bound by condition to pay 100 marks at a certain day, and at the day the parties do account together, and for that the feoffee or obligee did owe £20 to obligor or feoffor, that sum is allowed, and the residue of the 100 marks paid, this is a

payment of \$500 by B to A, and the immediate repayment thereof by A to B, is plain; but such payment and repayment would be an idle ceremony, and therefore the same result may be produced without performing that ceremony. So when two persons, between whom numerous cross demands exist, state an account (as it is called) and strike a balance, the effect is, that all the demands on one side, and all those on the other side, except such balance, are extinguished; for, by stating the account, the parties ascertain and agree upon the amount due by each to the other, and by striking a balance they agree that the cross demands so ascertained and agreed upon shall be set off against each other.

There is, however, a material distinction between the operation of law in extinguishing cross demands and the operation of an agreement of the parties in producing the same result; for the former, while it makes it a condition of enforcing the demands of either party that the amount of the demands of each party be ascertained, does nothing in the way of satisfying that condition, but leaves the amount of each party's demands just as uncertain as it would be if no extinguishment of them had taken place; and hence the application of the doctrine of compensation to cross demands always increases the complication of a trial, for it introduces new elements of complication without removing any old ones. In short, while the law can by its own operation cause cross demands to extinguish each other, so that the difference, if any, between them will alone remain due, it cannot ascertain the amount of such difference, if any, nor in favor of which party it exists. On the other hand, an agreement between two parties to set off their mutual demands against each other will seldom be made,

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good satisfaction; and yet the £20 was a chose in action, and no payment was made thereof but by way of retainer or discharge." Co. Litt. 213 a. "If the condition of an obligation be to pay 100 marks at a day, and at the day the obligor and obligee account together at another place, and because the obligee owes to the obligor £20 by another contract, the obligee allow the £20 in payment of the 100 marks, this is a good satisfaction of the condition, for this is all one as if the obligor had paid the obligee, and he had repaid him. 12 R. 2, Barre, 243. This is a payment by way of retainer." 1 Rol. Abr. 471, pl. 5. "The way in which an agreement to set one debt against another of equal amount, and discharge both, proves a plea of payment, is this: If the parties met, and one of them actually paid the other in coin, and the other handed back the same identical coin in payment of the gross debt, both would be paid. When the parties agree to consider both debts discharged without actual payment it has the same effect, because in contemplation of law a pecuniary transaction is supposed to have taken place by which each debt was then paid." Per Lord Campbell, C. J., in *Livingstone v. Whiting*, 15 Q. B. 722. And see, to the same effect, *Callander v. Howard*, 10 C. B. 290.

unless the amount of such demands be known ; and, even if their amount be known, such an agreement will seldom be made except by implication, and as an incident to or a consequence of some other agreement or transaction. Thus, an agreement between two parties to set off mutual demands, as to the amount of which there has never been any dispute or uncertainty, will seldom be made, except as incidental to the payment of the difference between them, and even then the only evidence of such an agreement will commonly be found in the fact that the parties treat such difference as the only debt existing between them. So also an agreement between two parties to set off mutual demands, the amount of which has been the subject of dispute or uncertainty, will seldom be made, except as a consequence of the ascertainment and settlement of such amount ; and even then the only evidence of such an agreement will commonly be found in the fact that the parties strike a balance, and treat such balance as the only debt existing between them. Hence, a set-off of mutual demands, by agreement between the parties thereto, so far from introducing any new element of complication, removes any complication which previously existed, and, so far from giving to either party a right to go into equity, it takes away any such right that previously existed.

When an account is stated of cross demands between two parties, and a balance struck, it seems that the implied agreement to set off the cross demands against each other will remain in force, though the statement of account be afterwards impeached and set aside, *e.g.*, on the ground of fraud ; and the effect, therefore, will be the same as if an agreement had been made to set off the cross demands against each other without any statement of account, or as if the cross demands had been set off against each other by mere operation of law ; and hence, though a balance only will remain due, yet, before such balance can be recovered, the amount of it must be ascertained, and to which of the two parties it is due ; and therefore the agreement to set off the cross demands against each other may result in the necessity of ascertaining, in a single suit, the amount due to each party from the other before any set-off was made, and thus, by increasing the complication, confer jurisdiction upon equity.

An agreement between two parties to set off cross demands against each other may, however, relate to cross demands not then

existing, but thereafter to arise; and in that case it seems that the agreement will operate upon the cross demands and cause their mutual extinguishment the moment they arise, provided neither of the parties have given any notice to the other to the contrary; for, in the absence of such notice, the parties will be conclusively presumed to remain of the same mind they were of when the agreement was made, and therefore the effect will be the same as if the agreement had been made at the moment when the cross demands arose. It is as true, however, of such an agreement as it is of an agreement to set off existing cross demands, that it will seldom be made otherwise than by implication; and the implication in this latter case will generally arise, if at all, from the nature and the course of the dealing between the parties. Moreover, the agreement will arise the moment it is called for by circumstances, *i.e.*, the moment that cross demands come into existence, and not till then; and as often as new cross demands arise, a new agreement to set them off against each other will arise. The cross demands, therefore, and the agreement to set them off against each other, will always co-exist, and hence there can be no doubt that the agreement will operate upon the cross demands and cause their actual extinguishment. And yet the amount of the respective cross demands will remain to be ascertained; and therefore such an agreement will have the same effect in increasing complication as an extinguishment of cross demands by operation of law.

It is, it seems, on the principle just explained, that cross demands between a banker and his customer extinguish each other. Indeed, if there be cross demands between a banker and his customer, there can be no doubt that they extinguish each other, and they can do this only in the mode just explained or by operation of law. Do cross demands, then, arise between a banker and his customer in the ordinary course of business? That every deposit by a customer with his banker creates a debt in favor of the former and against the latter, of course there is no doubt. Does every payment by the banker of a check drawn by the customer create a debt in favor of the former and against the latter? The general opinion seems to have been that it does not, but that it constitutes a payment *pro tanto* of the debt due from the banker to the customer.<sup>1</sup> This opinion, however, seems not to be well

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<sup>1</sup> See *Devaynes v. Noble*, 1 Mer. 529.

founded. The question does not depend upon the intention of the parties, but upon the legal operation of a check. A check, which is in effect a bill of exchange, does not call for the payment of a debt, but for the payment of the sum of money named in the check on the customer's account; and therefore the payment, when made, constitutes a debt for money paid by the banker to the customer's use. The check calls for the payment by the banker of the amount named in the check, without regard to the state of the account between the banker and the customer; but if the payment which it calls for were the payment of a debt due from the banker to the customer, it would be payable only to the extent of the debt then actually due from the former to the latter, and any payment beyond that amount would be made without authority. Indeed, payment of a check by a banker would be an admission by him that so much was due from him to the customer. Moreover, on the supposition just made, a check would operate as an assignment *pro tanto* of the debt due from the banker to the customer, and would thus give to the payee a right in equity to recover against the banker without any acceptance of the check by the latter; and yet it is well known that a check does not so operate.

Upon the whole, therefore, it seems that the items on the banker's side of his account with his customer constitute cross demands in his favor, or rather that they would do so but for the fact that they are set off against the items in the customer's favor the moment that they come into existence.<sup>1</sup> However, it is not material to the present inquiry whether they constitute cross demands or payments, for in either case they must equally be taken into account in considering whether a case between a banker and his customer is sufficiently complicated to warrant the filing of a bill in equity.

Though an agreement between two parties that their mutual demands shall be set off against each other will cause an actual set-off to take place, yet an agreement between two parties that their mutual demands shall be extinguished will not cause an ex-

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<sup>1</sup> It is scarcely necessary to observe that, as a banker credits his customer with all deposits made by the latter, so he debits him with all checks drawn by the customer on the banker, and paid by the latter. But for the reason stated in a previous note (p. 249, n. 1), no inference can be drawn from this circumstance that the items on the debit side of the customer's account constitute cross demands, and not payments of debts.

tinguishment to take place, unless the agreement can be construed as an agreement to make a set-off; for no debt or demand can be extinguished by a mere agreement. When, therefore, an extinguishment of cross demands takes place by way of set-off, it is immaterial, in respect to the extinguishment, whether the cause of the set-off be the agreement of the parties or the operation of law. It follows, therefore, that the extent of the extinguishment which takes place when cross demands are set off against each other, and hence the question to which of the parties, if to either, a balance remains due, as well as the amount of such balance, depend upon the amounts actually due from the parties respectively to each other before the set-off was made, and not upon the amounts agreed by the parties to be due. When, for example, an account is stated of cross demands between two parties and a balance struck, the statement of the account has no effect upon the cross demands, and hence it does not follow that the balance struck is the true balance, nor does the striking of it make it the true balance. And yet the statement of the account will be binding as an agreement (assuming, of course, that it has the ordinary requisites of a binding agreement), and hence the party in whose favor the balance is struck may recover such balance by reason of the agreement, but he must do so by an action on the agreement, and if he attempt to recover it as a part of the old debt still remaining due to him, the defendant may show that in truth the old debt has been wholly paid by means of the set-off. So, if either of the parties sue the other for any part of his old debt in violation of the agreement, the defendant will not be able to set up the account stated as showing that the debt sued for is not due,<sup>1</sup> and his only resource will be either to obtain an injunction against the action, or to set up the agreement as a defence by way of preventing circuity of action.

From what has been said in the preceding paragraph, it follows that, in respect to the extinguishment of cross demands, there is no difference in law between the striking of a balance as the result of stating an account, *i.e.*, of ascertaining the amounts actually due from the parties respectively to each other, and the striking of a balance as the result of a compromise of uncertain, doubtful, or disputed demands. In either case the balance struck may be right, and in either case it may be wrong, the true balance depending in

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<sup>1</sup> Therefore, in *Perry v. Attwood*, 6 El. & Bl. 691, the seventh plea was bad; and see cases cited *infra*, p. 262, nn. 2 and 3.

each case, not upon the statement of account or the compromise, but upon the facts which existed before the account was stated or the compromise made. In respect, however, to the agreement upon which the striking of the balance is based, there is a material difference between a statement of account and a compromise. The former is a regular and ordinary transaction, which generally takes place periodically and which is regarded by the parties to it as little more than routine. The latter, on the other hand, is entirely special in its nature. The former is in itself not an agreement, but a transaction which implies an agreement; and the only agreement which often accompanies it is such as it carries with it by implication. A compromise, on the other hand, is in itself an agreement and nothing else, and this is equivalent to saying that it is an express agreement. What the agreement is, therefore, in the case of an account stated, generally depends entirely upon implication or construction, and this implication or construction is of course always the same; and hence the question is one of law. In the case of a compromise, on the other hand, what the agreement is depends entirely upon what the parties have expressed, there being no basis upon which to make any implication or construction; and hence the question is one of fact.

What agreement then is to be implied in the case of an account stated? Clearly it must be an agreement that the account stated shall be taken to be true, at least *prima facie*, for otherwise the stating of an account would go for nothing. On the other hand, it clearly would be wrong to imply an agreement that the account stated shall be taken to be true absolutely, *i.e.*, that neither party shall be permitted to show that it contains any mistakes or errors, or that anything has been omitted from it which ought to have been included in it; for the object of stating an account is not to make a bargain, but to find out the truth. When an account has been stated, therefore, the parties to it, if they be honest, suppose it to be true, and hence any implication of an agreement respecting it must be on the supposition of its being true. If, therefore, that supposition fails, the agreement also fails. How, then, can an account stated be given that binding effect, without which it would be a nullity, and yet be prevented from having a binding effect which the parties to it never contemplated, and which therefore would work injustice? Clearly by implying a conditional agreement, namely, that the account stated shall be

taken to be true, unless (and except so far as) one of the parties to it shall prove mistakes or errors in it, or omissions from it. That such a condition ought to be implied is proved by the prevailing practice of placing at the foot of every account the words, "Errors and omissions excepted," — a practice which is believed never to be departed from, except through inadvertence, or because an express exception is supposed to be unnecessary.<sup>1</sup> In the case of a compromise, on the other hand, as there is no implied *agreement*, so there can be no implied *condition*; and, therefore, in the absence of an express condition, a compromise is absolutely binding. Moreover, such a condition as is implied in the case of an account stated, would be inconsistent with the nature of a compromise; for a compromise is a bargain, the object of which is to supersede the necessity of investigating the facts which are the subject of the compromise, — a bargain, the very essence of which consists in an agreement that certain facts, supposed to be uncertain or doubtful, shall be conclusively taken, as between the parties to the agreement, to be thus and so. Of course the motive of each party in making a compromise is the promotion of his own interests, namely, by obtaining better terms than he thinks he has an even chance of obtaining otherwise, or by saving trouble and expense, or in both of these ways; but whatever the motive, each party acts upon his own knowledge and judgment as to all doubtful facts, and he acts at his peril.<sup>2</sup>

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<sup>1</sup> "It is common to add to a statement of accounts, 'Errors excepted;' I think that such exception must be understood, even where not expressed." Per Lord Campbell, C. J., in *Perry v. Attwood*, 6 El. & Bl. 691, 700.

<sup>2</sup> "Parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other should be furnished in the settlement of those accounts; and, if it afterwards turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity. If, on the other hand, persons meet and agree not to ascertain the exact balance, but agree to take a gross sum as the balance; a sum which one is willing to pay, and the other is content to receive as the result of those accounts; it is obvious that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled; therefore, it is either an account stated and settled in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud." Per Lord Kingsdown, in *McKellar v. Wallace*, 8 Moo. P. C. 378, 401-2.

Of course the same transactions may be the subject of both a statement of account and a compromise; for the parties may first state an account, and then they may agree that the account so stated shall be taken as absolutely true; but in that case the account stated is entirely superseded by the compromise; and as a compromise can be only by express agreement, of course a compromise can never be inferred as a consequence of an account stated.

The result, therefore, is that, while a compromise can be impeached only for fraud, an account stated can be impeached either for fraud or error. If either a compromise or an account stated be impeached for fraud, of course the plaintiff will have the burden of proof, and he will have to establish fraud at the hearing, or his bill will be dismissed. If he succeed in making out a case of fraud, a decree will be made setting aside the compromise or the account stated, and referring the cause to a Master to take an account, just as if no compromise had been made, or no account had been stated.<sup>1</sup> If an account stated be impeached on account of errors or omissions, the plaintiff will also have the burden of proof,<sup>2</sup> but he will not have to establish errors or omissions at the hearing of the cause.<sup>3</sup> On the contrary, he will be entitled to a decree as of course, referring the cause to a Master to take an account; but the Master will be directed, in case he shall find

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<sup>1</sup> In *Allfrey v. Allfrey*, 1 M. & G. 87, Lord Cottenham said (p. 93): "The only question in this cause is, whether the decree should be for an open account generally, or a decree to surcharge and falsify. Now the distinction between these two has not been accurately observed in some more recent cases. But if you look to the earlier cases, you will find the rule clearly laid down. In the case of *Vernon v. Vawdry*, 2 Atk. 119, it is said: 'If there are only mistakes and omissions in a stated account, the party objecting shall be allowed no more than to surcharge and falsify. But if it appears to the Court that there has been fraud and imposition, the decree must be, that the whole shall be opened.' . . . I have acted upon that doctrine, affirming a decree of Lord Langdale's, in *Wedderburn v. Wedderburn*, 4 M. & Cr. 41. Now it is quite obvious, that that is, strictly speaking, the doctrine and principle of this Court, because, if a transaction, whether it be a deed, or an agreement, or an account stated and settled, which is only an agreement, be proved to be fraudulent, there is nothing on which it can stand: the transaction itself is void." See also *Coleman v. Mellersh*, 2 M. & G. 309.

<sup>2</sup> *Dawson v. Dawson*, West, 171, 1 Atk. 1; *Pit v. Cholmondeley*, 2 Ves. 565. There is a distinction, however, between errors and omissions. As to errors, the burden of proof is shifted from the defendant to the plaintiff by the agreement implied by the account stated. As to omissions, on the other hand, the burden of proof simply remains where it always was, namely, with the plaintiff.

<sup>3</sup> This is because the items of an account are never investigated at the hearing of the cause, but are always investigated after the hearing and in the Master's office.

an account stated between the parties, to let the same stand, but to permit the plaintiff to surcharge or falsify the same.<sup>1</sup> Under this decree, the plaintiff will be permitted to show that the defendant ought to be debited with certain items which have been omitted from the account; and such items as the plaintiff proves will be added to the account by the Master. This is called surcharging the account.<sup>2</sup> The plaintiff will also be permitted to show that the defendant has been credited in the accounts stated with certain items with which he ought not to be credited; and such items as he proves to be erroneous will be stricken out by the Master. This is called falsifying the account.<sup>3</sup> When the evidence is all in, the Master will make up the account, consisting of the account stated, with such additions and corrections as the proof requires, and report the same to the court.

What has been said as to impeaching an account stated on account of errors or omissions, is applicable to an account which has been stated pursuant to an obligation to account, as well as to an account stated respecting cross demands, or respecting demands, all of which are in favor of the same creditor and against the same debtor, except that, in the former case, the account stated is a thing executed, *i.e.*, it extinguishes the obligation to account, and converts the balance found in favor of the obligee into a legal debt, without regard to errors or omissions; while in the two latter cases the account stated rests merely in agreement, especially as regards errors or omissions; and a consequence of this difference is

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<sup>1</sup> *Kinsman v. Barker*, 14 Ves. 579; *Fitzpatrick v. Mahony*, 1 J. & La T. 84. The phrase "surcharge and falsify" is derived from the ancient mode of accounting in equity, according to which the items in every account were all reduced to two classes, namely, items of charge and items of discharge. This mode of accounting was perfectly adapted to an accounting upon a bill for an account, but it was not so well adapted to an accounting upon a bill of equitable assumpsit, *i.e.*, as between debtor and creditor. When applied to this latter species of accounting, the items of charge consisted of the items which made up the indebtedness of the defendant to the plaintiff, while the items of discharge consisted of the payments made by the defendant, with any other items of defence. Under this system a plaintiff and a defendant could not both be accounting parties in the same account. In the case, therefore, of cross demands, as the plaintiff and the defendant were both accounting parties, there had to be two separate accounts, each with its two classes of items.

This mode of accounting was abolished in England by the 61st order of April 3, 1828, by which it was provided "that all parties accounting before the Masters shall bring in their accounts in the form of debtor and creditor." See *Sanders' Orders*, 725.

<sup>2</sup> *Pit v. Cholmondeley*, 2 Ves. 565.

<sup>3</sup> *Pit v. Cholmondeley*, *supra*.

that an account stated, in the former case, can be impeached for errors or omissions in equity alone, while, in the two latter cases, so far as it can be proved to be erroneous or defective, it is invalid both at law and in equity.<sup>1</sup>

It remains to speak of an important distinction between an accounting pursuant to an obligation to account, and a statement of accounts respecting cross demands, — a distinction which has already been alluded to more than once, but which requires to be examined with more particularity. An accounting pursuant to an obligation to account is an extinguishment of one cause of action, and the creation of another in lieu of it. It is, therefore, at once a defence and a cause of action, — a defence to an action on the obligation to account, and a cause of action to recover the balance found in the plaintiff's favor, which balance is a debt created by the accounting. A statement of accounts respecting cross demands, on the other hand, extinguishes nothing of the original demands, except indirectly, namely, by means of a set-off, and creates no new right of action, except a right of action on an executory agreement, and the balance which is found in favor of one of the parties is not a new debt, but a portion of that party's original debt, namely, so much of it as has not been extinguished by the set-off. One consequence of this distinction is, that, in an action or suit to recover a balance found in the plaintiff's favor, such balance should be described, in the one case, as a debt due upon an account stated, in the other case, as a debt due for the same cause as the plaintiff's original demand. Another consequence is that if a claim be sued for which has been extinguished, either by or in consequence of the statement of an account, the defence will be, in the one case, an account stated, in the other, payment. Clear as this distinction is in principle, it has never obtained any recognition in equity, — a fact which, considering that no distinction between the two kinds of accounting has ever been recognized in equity, is not surprising. What is surprising, however, is the fact that the distinction in question has obtained only partial recognition at law, and the further fact that there is an absolute inconsistency between the recognition of it at law, on the one hand, and the failure to recognize it, on the other hand. Thus, it is perfectly clear that "accounts stated" was never a good plea at law, except to an action

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<sup>1</sup> Therefore, in *Perry v. Attwood*, 6 El. & Bl. 691, if the seventh plea had been good, the replication would have been a good legal answer to it.

of account (in which case it took the name of *plene computavit*); and of course it follows that no action should lie upon an account stated, unless the account stated be one which might formerly have been enforced by an action of account. Yet, with extraordinary inconsistency, and through an extraordinary perversion of the *indebitatus* count in assumpsit upon an account stated, it is held that that count is available, not merely in all cases where an account has been stated respecting cross demands, but in all cases where there has been even a verbal admission by the defendant that he owed a certain sum to the plaintiff, though there have never been any cross demands, nor any formal statement of account between the parties. That this is a perversion of the count upon an account stated there can be no doubt. That count had its origin in the action of debt for arrearages of account,—a form of action (or rather a form of count) devised expressly and exclusively for cases in which a balance had been found in the plaintiff's favor upon an accounting by the defendant pursuant to an obligation to account, and such balance remained unpaid, *i.e.*, for cases in which the proper action would have been account, but for the fact that there had already been an accounting, and hence an action of account would be met by a plea of *plene computavit*. When the action of debt on simple contract came to be superseded by *indebitatus* assumpsit, the count in debt for arrearages of account was converted into the count upon an account stated in assumpsit; and, therefore, the latter should have remained subject to the same limitations to which the former was subject; and so it did for a time.<sup>1</sup> But with the disuse of the action of account, the proper function of the count upon an account stated was lost sight of, and hence its proper limitations soon came to be disregarded. One of the minor evils consequent upon this departure from principle has been that the count upon an account stated has ceased to be (what it once was) a test of the cases in which an action of account would formerly lie, and in which therefore a bill for an account will now lie.

When the count upon an account stated had been thus extended beyond its true bounds, consistency required that the defence of

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<sup>1</sup> *Hamond v. Ward*, Styles, 287, 1 Lilly's Pr. Reg. 30, decided in Trinity Term, 1651. The form of the action appears to have been debt upon an account stated, but the view of the court clearly was not based upon any supposed distinction between debt and assumpsit.

account stated should be extended in like manner; for whenever a plaintiff is permitted to sue upon an account stated as a new cause of action, he ought to be precluded from suing upon the old cause of action which was the subject of the accounting; and accordingly, in one case,<sup>1</sup> in the time of Chief Justice North, it was held to be a good plea to an action of *indebitatus* assumpsit that an account had been stated respecting the debts for which the action was brought; but that decision was overruled in the time of Lord Holt, the latter saying of it: "The case quoted out of the Moderns was the first of this kind, and by my consent shall be the last. And to plead it as an account is but argumentative of payment (which is direct), and therefore not to be allowed."<sup>2</sup> Other cases,<sup>3</sup> which soon followed, established conclusively that account stated is no plea, except to an action of account; and yet, in every case in which it was so decided, the court would have held that the plaintiff might have declared upon the account stated, and that the declaration upon it would have been supported by the evidence. And this strange inconsistency has continued to exist to this day, and that too without ever having attracted attention.

C. C. Langdell.

[To be continued.]

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<sup>1</sup> *Milward v. Ingram*, 1 Mod. 205, 2 Mod. 43, Freem. 195. North, C. J., said (2 Mod. 44): "There are two demands in the declaration, to which the defendant pleads an account stated, so that the plaintiff can never after have recourse to the first contract, which is thereby merged in the account. If A sell his horse to B for £10, and, there being divers other dealings between them, they come to an account upon the whole, and B is found in arrear £5, A must bring his *insimul computassent*; for he can never recover upon an *indebitatus* assumpsit."

<sup>2</sup> *May v. King*, 12 Mod. 538.

<sup>3</sup> *Atherley v. Evans*, Sayer, 269; *Roades v. Barnes*, 1 Burr. 9; *Thomas v. Heathorn*, 2 B. & Cr. 477; *Callander v. Howard*, 10 C. B. 290.